

SHEPPARD MULLIN RICHTER & HAMPTON, LLP  
 Andre Cronthall (SB # 117088)  
 Fred Puglisi (SB # 121822)  
 333 S. Hope St., 43<sup>rd</sup> floor  
 Los Angeles, California 90071-1422  
 (213) 620-1780  
 acronthall@sheppardmullin.com

GARDERE WYNNE SEWELL, LLP  
 Dwight M. Francis, *Pro Hac Vice* (Texas Bar 00785877)  
 1601 Elm St., Ste. 3000  
 Dallas, TX 75201  
 Telephone: (214) 999-3000  
 Facsimile: (214) 999-4667  
 dfrancis@gardere.com  
 ATTORNEYS FOR DEFENDANT

UNITED STATES DISTRICT COURT  
 CENTRAL DISTRICT OF CALIFORNIA

EDWARD MAKARON, on behalf of himself  
 and all others similarly situated,

Plaintiff,

v.

ENAGIC USA INC.,

Defendant.

Case No. 2:15-CV-05145-DDP-E

**DEFENDANT ENAGIC USA, INC.'S  
 BRIEF IN SUPPORT OF ITS MOTION TO  
 DISMISS PLAINTIFF'S FIRST AMENDED  
 COMPLAINT**

Assigned to:  
 The Honorable Dean D. Pregerson  
 Referred to:  
 Magistrate Judge Charles F. Eick

Hearing Date: November 9, 2015  
 Time: 10:00 a.m.  
 Dept. 3

Pursuant to Federal Rules of Civil Procedure 8, 9, and 12(b)(6), Defendant Enagic USA, Inc. ("Enagic") files this Brief in Support of its Motion to Dismiss Plaintiff's First Amended Complaint (Doc. No. 15).

## I. BACKGROUND

Plaintiff Edward Makaron (“Plaintiff”) alleges that on May 18, 2015, he received a recruiting call from telephone number 469-340-4080 and that two days later he received a call from a Gary Nixon who tried to recruit Plaintiff as a sales person for Enagic. Amend. Compl., ¶¶ 7-8. Plaintiff alleges that Enagic used an “automatic telephone dialing system” to contact him and which played a pre-recorded message. Amend. Compl., ¶ 7 and 9. The complaint does not contain any other factual allegations regarding the alleged telephone call from 469-340-4080 or any other calls. *See* Amend. Compl., ¶¶ 6-12.

Plaintiff does not plead facts in support of the allegation that Enagic made the offending calls. Nonetheless, Plaintiff claims that the telephone calls are both a negligent and an intentional violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227, et seq. (the “TCPA”) for which Enagic is liable. Amend. Compl., ¶¶ 7-8. Essentially, Plaintiff seeks to recover monetary damages for each alleged telephone call without providing Enagic any factual information about the calls. In this context, Plaintiff’s conclusory allegations do not state a claim under the TCPA.

Pursuant to Rule 12(b)(6), Plaintiff’s claims for violation of the TCPA should be dismissed because the complaint does not allege facts that demonstrate that Enagic initiated a telephone call to Plaintiff’s cellular telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of Plaintiff.

## II. ARGUMENT

### A. Legal Standard.

“To survive a motion to dismiss, a complaint must plead sufficient ‘factual matter, accepted as true’ to ‘allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.’” *Sepehry-Fard v. MB Fin. Serv.*, 2014 WL 2191994,, at \*3-4 (N.D.

1 Cal. May 23, 2014) citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The *Sepehry-Fard* Court  
 2 emphasized that the Plaintiff is required to plead “more than labels and conclusions, a formulaic  
 3 recitation of the elements of a cause of action or naked assertions devoid of further factual  
 4 enhancement”. *Sepehry-Fard*, 2014 WL 2191994, at \*3-4 (citing *Bell Atlantic Corp. v.*  
 5 *Twombly*, 550 U.S. 544, 555 (2007)).

7 A complaint is properly dismissed if it fails to “plead ‘enough facts to state a claim to  
 8 relief that is plausible on its face.” *Weber v. Dep’t of Veterans Affairs*, 521 F.3d 1061, 1065 (9th  
 9 Cir.2008). See also *Parkhill v. Minn. Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002)  
 10 (holding that well-pleaded facts, not legal theories or conclusions, determine adequacy of  
 11 complaint); *Silver v. H&R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997) (“In considering a  
 12 motion to dismiss, courts accept the plaintiff’s factual allegations as true, but reject conclusory  
 13 allegations of law and unwarranted inferences.”). The facts alleged by the plaintiff in the  
 14 amended complaint are insufficient to support a cause of action against Enagic under the TCPA.  
 15 Therefore, Enagic’s motion to dismiss should be granted and plaintiff’s claims against Enagic  
 16 should be dismissed.

18 **B. Plaintiff Failed to Plead Facts Sufficient to State a Claim Under the TCPA.**

19 The TCPA states, in relevant part, that:

20 It shall be unlawful for any person within the United States, or any person outside  
 21 the United States if the recipient is within the United States-

22 (A) to make any call (other than a call made for emergency purposes or made with  
 23 the prior express consent of the called party) using any automatic telephone dialing  
 24 system or an artificial or prerecorded voice—

25 ...

26 (iii) to any telephone number assigned to a paging service, cellular telephone  
 27 service, specialized mobile radio service, or other radio common carrier service, or  
 28 any service for which the called party is charged for the call[.]

1 47 U.S.C. § 227(b)(1). The TCPA defines the term “automatic telephone dialing system” to mean  
2 “equipment which has the capacity -- (A) to store or produce telephone numbers to be called,  
3 using a random or sequential number generator; and (B) to dial such numbers.” *Id.* § 227(a)(1).  
4 Therefore, in order to allege a claim under the TCPA, Plaintiff must plead facts that, if proven,  
5 would demonstrate that Enagic made the alleged calls to Plaintiff’s cellular number, that Enagic  
6 used an automatic telephone dialing system, and that the automated calls were made without  
7 Plaintiff’s prior consent. *Id.* § 227(b)(1). *Sepehry-Fard*, 2014 WL 2191994, at \*3-4.

9 In *Sepehry-Fard*, the Court granted the defendant’s motion to dismiss a TCPA complaint  
10 because the plaintiff did not plead facts in the complaint explaining why he believed that the  
11 defendant made the offending calls, failed to describe the date, timing, or specific content of the  
12 offending calls, and failed to allege facts stating why he believed the calls were artificial or a  
13 prerecorded voice. *Id.* Likewise, Plaintiff has not alleged any facts that would show that Enagic  
14 initiated a telephone call to Plaintiff and used an artificial or prerecorded voice to deliver a  
15 message to Plaintiff.  
16

17 Plaintiff alleges that Gary Nixon called Plaintiff and “tried to recruit Plaintiff as a  
18 salesperson for Defendant, and suggested Plaintiff watch a video about Defendant’s products.”  
19 Amend. Compl., ¶ 8. Even putting aside the deficiencies in Plaintiff’s claims with respect to the  
20 type and content of calls he received, Plaintiff’s claim against Enagic also fails because he does  
21 not allege facts to show that Enagic could be vicariously liable for calls made by the third parties  
22 named in the complaint. Plaintiff simply alleges the callers were Enagic’s representatives. First  
23 Amend. Compl., ¶ 7. These allegations are insufficient to state a claim for vicarious liability.  
24

25 As recognized in *Cunningham v. Kondaur Capital*, 2014 WL 8335868, at \*5-8 (M.D.  
26 Tenn. Nov. 19, 2014), “the mere possibility that a defendant may be vicariously liable is not  
27 sufficient to state a claim for relief, and pleading facts that are merely consistent with liability is  
28

1 not enough.” *Id.* at \*8-9 (citing *Iqbal*, 556 U.S. at 678). Plaintiff must plead sufficient factual  
2 allegations to support a plausible claim against Enagic based upon those facts. *Id.* The Amended  
3 Complaint simply does not contain such facts. There are no factual allegations Enagic itself had  
4 any interaction with Plaintiff; Plaintiff alleges only that he spoke with third party individuals.  
5 Further, although Plaintiff alleges the individual he spoke with referred to Enagic, there are no  
6 factual allegations showing that these individuals were in fact acting at the directive of or on  
7 behalf of Enagic. Plaintiff does not allege he was transferred to Enagic during the telephone calls,  
8 that Enagic subsequently contacted him in any manner, or any other allegations from which it  
9 could reasonably be inferred that Enagic was provided information about Plaintiff or that Enagic  
10 was a de facto participant in the telephone calls.  
11

12 In sum, Plaintiff’s threadbare accusations that Enagic is liable for violations of Section  
13 227(b) of the TCPA are wholly unsupported by factual allegations. For these reasons, Plaintiff’s  
14 claim for violation of the TCPA and should be dismissed.  
15

16 **C. Plaintiff Failed to Plead Facts Sufficient to State a Claim Under TCPA Section**  
17 **227(c).**

18 Plaintiff claims that he received recruiting calls from Enagic representatives. Amend.  
19 Compl., ¶ 8. This threadbare allegation does not satisfy the federal pleading standard. Plaintiff  
20 never alleges that Enagic made telemarketing calls to him. To the contrary, the allegations  
21 suggest the calls were about a business opportunity whereby Plaintiff was recruited to sell certain  
22 products. The allegation that Plaintiff received such recruiting calls to not state a claim under the  
23 TCPA. See *Reardon v. Uber Tech., Inc.*, 2015 WL 4451209 (N.D. Cal. July 19, 2015). In *Uber*  
24 *Tech.*, the court noted that texts from Uber seeking to recruit drivers were not advertisements and  
25 did not state a claim under the TCPA. *Id.* See also, *Dolemba v. Ill. Farmers Ins. Co.*, 2015 WL  
26 4727331, \*5 (N.D. Ill. Aug. 10, 2015) (recruitment call is not an advertisement); *Friedman v.*  
27  
28

1 *Torchmark Corp.*, 2013 WL 1629084 (S.D. Cal. Aug. 13, 2013) (Defendant's calls to the plaintiff  
2 regarding a recruiting webinar is not a TCPA violation). Further, Plaintiff never even alleges his  
3 number was on any "do not call list."

4  
5 For these reasons, Plaintiff's conclusory allegations do not state a claim for violation of  
6 the TCPA and should be dismissed.

7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
**III.  
CONCLUSION**

9 For the reasons described above, Enagic USA, Inc. respectfully requests that this Court  
10 dismiss Plaintiff's claims against it and that this Court grant such other relief to which Enagic is  
11 justly entitled.

12  
13 Dated: October 5, 2015

RESPECTFULLY SUBMITTED,

14 Dwight M. Francis, *Pro Hac Vice*  
15 GARDERE WYNNE SEWELL, LLP  
16 1601 Elm St., Ste. 3000  
17 Dallas, TX 75201

18 /s/ Dwight M. Francis  
19 Attorneys for ENAGIC USA, INC.

PROOF OF SERVICE

STATE OF TEXAS, COUNTY OF DALLAS

I am employed in the County of Dallas; I am over the age of eighteen years and not a party to the within entitled action; my business address is 1601 Elm St., Ste. 3000, Dallas, TX 75201.

On October 5, 2015, I served the following document(s) described as **DEFENDANT ENAGIC USA, INC.'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** on the interested party(ies) in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Todd M. Friedman  
Suren N. Weerasuriya  
Adrian R. Bacon  
LAW OFFICES OF TODD M. FRIEDMAN  
324 S. Beverly Dr. #725  
Beverly Hills, CA 90212  
TEL: 877-206-4741  
FAX: 866-633-0228

☒ **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 5, 2015, at Dallas, Texas.

/s/ Wendi M. Taylor  
Wendi Taylor